United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

B P/S

74-1001

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1001

TRUCK DRIVERS LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

—and—

PENSION FUND OF NEW YORK CITY TRUCKING INDUSTRY LOCAL 807,

Intervenor,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

JOINT BRIEF OF PETITIONER AND INTERVENOR

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Preliminary Statement

This is an appeal by Truck Drivers Local Union No. 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 807" or "Petitioner") to review and set aside a final order of the National Labor Relations Board ("Board"), pursuant to Section 10(f) of the National Labor Relations Act,[1] as amended ("Act"), wherein the Board found that Local 807 had violated Sections 8(b)(1)(A) and 8(b)(2) of the Act.[2]

[1] 29 U.S.C. Section 160(f).

[2] 29 U.S.C. Section 158(b)(1)(A) and (b)(2).

The Board filed a cross application to enforce its Order. The Pension Fund of the New York City Trucking Industry —Local 807 ("Pension Fund" or "Intervenor") has been permitted to intervene in this proceeding.

Issues Presented

1. Was there a *per se* violation of Sections 8(b)(1)(A) and (2) of the Act by Petitioner being a party to a collective bargaining agreement which provided that contributions be made to the Pension Fund, in view of the fact that the Pension Fund included in its Rules and Regulations the following sentence (Article III, Section 2(a)):

> "Consequently, anyone who was a member of Local 807 prior to the period commencing January 1, 1937 may, at the sole discretion of the Trustees, be given a year of Pension Credit for each year he was a member of Local 807 during this period" (J.A. 185).[3]

2. Was there substantial evidence of record, considered as a whole, to support the findings and conclusions of the Board?

Statement of the Case

Individual unfair labor practice charges were filed by George Lightfoot, Anthony Palumbo and Tony Greco on October 19, 1972 against Petitioner (J.A. 67-69). Each alleged that Petitioner had engaged in an unfair labor practice within the meaning of Section 8(b)(1)(A) of the Act by basing pension benefits upon length of union membership in Local 807.

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[3] J.A. refers to the Joint Appendix filed by the parties herein.

The Regional Director for the Twenty-Ninth Region of the Board, by notice dated December 15, 1972, refused to issue a Complaint against Petitioner insofar as each charge alleged unlawful denial of pension benefits by the Pension Fund because of non-union membership in Local 807 (J.A. 82-84). Lightfoot, Palumbo and Greco appealed that decision to the Board's Office of the General Counsel. On January 24, 1973 their appeals were denied (J.A. 85-89). Nevertheless, an order consolidating the Lightfoot, Palumbo and Greco cases, together with a Complaint against the Petitioner, was issued on December 15, 1972 (J.A. 3-9). The Complaint alleged that Petitioner, by reason of Article III, Section 2(a) of the Pension Fund's Rules and Regulations ("Section 2(a)"), was in violation of Sections 8(b)(1)(A) and (2) of the Act, by maintaining in effect and enforcing a collective bargaining agreement which provided for employer contributions into a jointly administered pension trust which accorded a preference, in the accumulation of pension credits, to those persons solely because they were members of Petitioner for the period prior to January 1, 1937.

Petitioner filed an Answer denying the allegation that the Pension Fund accorded a preference to Petitioner members in the accumulation of pre-1937 pension credits and affirmatively averred that the Complaint was not supported by a charge and, in the alternative, that any preference, for the period prior to January 1, 1937, cannot violate Sections 8(b)(1)(A) or (2) of the Act (J.A. 10-12).

A hearing was held before Administrative Law Judge Benjamin A. Theeman, at Brooklyn, N. Y. on April 30 and May 1, 1973. Thereafter, the Administrative Law Judge found that the Petitioner had not engaged in any violation

of the Act in the actual administration of the Pension Fund (J.A. 186), but that Section 2(a) on its face violated Sections 8(b)(1)(A) and (2) (J.A. 185).

Petitioner and Intervenor, on August 17, 1973, filed timely exceptions to the Administrative Law Judge's Decision (J.A. 191-197). On November 13, 1973 the Board, by a delegated three-member panel, issued a Decision and Order and adopted the rulings, findings and conclusions of the Administrative Law Judge and his recommended Order, as modified. The Board stated that the Decision of the Administrative Law Judge did not appear to proscribe using membership in a labor organization as a factor in determining eligibility for pension credits, whereas his recommended Order appeared to do so. Accordingly, the Board modified the recommended Order specifically permitting the Pension Fund to use union membership as a factor in determining eligibility for pre-1937 pension credits (J.A. 198).

Statement of Facts

The Pension Fund is a jointly administered trust fund authorized under Section 302(c)(5)[4] of the Act to provide pension benefits for employees and was created by a trust indenture as of September 1, 1950 (J.A. 121-140, 141).

The Pension Fund is administered by four (4) employer Trustees and four (4) Trustees designated by Petitioner. Any action of the Trustees requires the concurrence of a majority of both employer and Petitioner Trustees. Each group votes as a unit and in the event of a dispute it is submitted to an impartial arbitrator for determination (J.A. 163).

[4] 29 U.S.C. 186(c)(5).

Contributions are paid into the Pension Fund on behalf of employees by their contributing employers. These contributions are made in accordance with collective bargaining agreements between the Petitioner and employers. Benefits from the Pension Fund are currently being paid to approximately 2,400 pensioners (J.A. 48).

Prior to October 1, 1971 covered employees with more than thirty (30) years of pension credit were limited to the prevailing Thirty Year Pension benefit (J.A. 101). The Thirty Year Pension is the highest class of benefit provided by the Pension Fund. Effective October 1, 1971 the Pension Fund's benefit schedule was amended so that, for each year of pension credit above thirty (30), eligible employees received $10.00 per month in addition to the prevailing Thirty Year Pension benefit (J.A. 42).

All applicants seeking any type of pension benefit prepare the same application (J.A. 146-150), Social Security authorization (J.A. 151), retirement affidavit (J.A. 152) and retirement declaration (J.A. 153). The Pension Fund's staff takes over from there. Eligibility for future service credit is determined from the books and records of the Pension Fund.[5] Eligibility for past service credit[6] (for which the Pension Fund does not have its own records) is established by reliance upon outside sources, i.e., employer, Social Security and Local 807 records.

From 1937 to 1950 Social Security records verify employment with the employer set forth on the pension appli-

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[5] Future service credit refers to the period after September 1, 1950, for which contributions have been made into the Pension Fund pursuant to a labor agreement with the Petitioner (J.A. 40).

[6] Past service credit refers to the period prior to September 1, 1950 (J.A. 40).

cation. The employer and union records are used to establish that the applicant worked in covered employment, i.e., truck driver, helper or warehouseman. For the pre-1937 period there are no Social Security records available (J.A. 39). In addition, many pre-1937 employers are out of business, did not maintain and/or have not retained employment records for that period. The complete absence of Social Security records and, in many cases, the unavailability of pre-1937 employer records presented a significant administrative problem for the Trustees. To meet this problem the Trustees adopted Section 2(a) on February 28, 1972. Part of Section 2(a) requires pre-1937 credits to be granted where employer records for that period are available. If employer records are not available the Trustees use Petitioner records as a factor in determining eligibility for pre-1937 credits, and "may", at their sole discretion, award credits for the pre-1937 period that the applicant was a Petitioner member.

Before making eligibility determinations for the pre-1937 period, the Trustees not only examine all available records, but also rely upon their own knowledge and experience of the pre-1937 trucking industry within the City of New York (J.A. 57-58). Where the available information before the Trustees does not support applicant's claim of pre-1937 covered employment no credit is given for that period irrespective of applicant's membership or non-membership in Local 807, i.e., Henry Wild, Rosario Spinelli, Joseph Rocco and George Kronen (J.A. 143, 145).

Section 2(a) does not establish nor has it been interpreted by the Trustees to mean that pre-1937 membership in Local 807 creates an irrebuttable presumption of covered employment for that period. Both the Administrative Law

Judge and the Board found no evidence of discrimination by the Trustees in the application of Section 2(a).

Summary of Argument

Although, the Trustees' interpretation and application of Section 2(a) was not found to violate the Act, the Board held that Section 2(a), *per se,* violated Sections 8(b)(1)(A) and (2) of the Act. Petitioner and Intervenor contend (1) that Section 2(a) does not constitute a *per se* violation of the Act; (2) that there is no record evidence establishing that Section 2(a) permits a discriminatory advantage to Local 807 members or encourages membership in Local 807; and (3) that the Board has not made a showing of actual motive to encourage Local 807 membership.

1.

Article III, Section 2(a) of the Pension Fund's Rules and Regulations is not *per se* unlawful.

Section 2(a) deals with a practical administrative problem. Social Security records are totally unavailable and employer records are generally insufficient for the pre-1937 period. It would be inequitable to senior pension applicants for the Trustees to cut off their $15.00 per month increment, for service in excess of thirty (30) years, arising prior to January 1, 1937. This would be equally true if the pre-1937 increment was limited to only those senior applicants whose employers retain pre-1937 employment records.

There are two (2) groups of applicants seeking pre-1937 credits: (1) those for whom employer records are available and (2) those for whom they are not. When employer

records are available and show covered employment pension credits are granted regardless of Local 807 membership. When those records are not available the Trustees may properly rely upon Petitioner records as a factor in determining, in their discretion, whether an applicant is entitled to pre-1937 pension credit. Section 2(a) does not contain the irrebuttable presumption proscribed in *Nu-Car Carriers, Inc.*, 187 NLRB No. 117, 455 F.2d 615 (C.A. 3, 1972).

The Board in deciding *Nu-Car Carriers* relied upon its decision in *J. J. Hagerty, Inc.*, 139 NLRB 633, enf. 321 F.2d 130 (C.A. 2, 1963). *Hagerty* may support the Board's decision in *Nu-Car Carriers,* forbidding the inclusion of a discriminatory presumption in the rules and regulations of a pension fund, but is inapplicable to the facts in this case. The provisions found unlawful in *Hagerty* made welfare coverage available only to employees who maintained their financial good standing in the union. On its face, this eligibility requirement was unlawful. Accordingly, the interpretation and application of this provision was immaterial.

These are not the facts in the case at bar. Section 2(a) is not, on its face, unlawful. The General Counsel offered no proof of discriminatory conduct and the Board found no violation of the Act in the interpretation or application of Section 2(a) (J.A. 186). Therefore, there is absolutely no support for the Board's presumption that Section 2(a) is *per se* unlawful. The Board improperly read into the provisions of Section 2(a) a non-existent (according to its own findings) unlawful purpose. Section 2(a) cannot be construed to mean that pre-1937 pension credit is dependent upon union or non-union membership for that period. The

language cannot be understood to create any advantage beyond that Local 807 membership records may be considered as a factor in determining eligibility for pre-1937 credits. Nor is there record evidence to support any inference that the Trustees will exercise discretion to grant pre-1937 pension credits to union members and not to non-union members, where there is no evidence of covered employment. Each of the 32 cases referred to in General Counsel's Exhibit 9 (J.A. 143-145) was resolved on its own merits and in each case evidence, other than Petitioner membership, was considered by the Trustees (J.A. 184). Trustee discretion was exercised without resort to presumptions or discrimination (J.A. 167-168).

Section 2(a) is not unlawful on its face and the Board should not indulge in a presumption of illegality. In *NLRB* v. *News Syndicate*, 365 U.S. 695 (1961), the Supreme Court affirmed this Court's holding that "[I]n the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives." Where there is no direct evidence of unlawful discrimination the Board cannot presume illegality. *NLRB* v. *Revere Metal Art Co.*, 280 F.2d 96 (C.A. 2, 1960); *Local 138 Operating Engineers* v. *NLRB*, 321 F.2d 130 (C.A. 2, 1963).

2.

The Board erroneously found that Section 2(a) established a discriminatory advantage to Petitioner members and encourages membership in Petitioner union.

Section 2(a) does not create the "discriminatory advantage" to Petitioner members found by the Board. That conclusion was based upon an erroneous predicate (J.A. 165-166). The controlling test for the Trustees is covered employment. Pre-1937 membership records are merely a factor considered in that determination.

However, assuming, *arguendo,* that one were to construe Section 2(a) to give a "discriminatory advantage" to Petitioner members it still does not violate Sections 8(b)(1)(A) or 8(b)(2) since it does not "encourage or discourage membership in any labor organization." Membership prior to 1937 could entitle an applicant to pension credit. Continued membership would be immaterial. Joining Petitioner union on or after January 1, 1937 would not increase an applicant's pension credit, nor would withdrawal from membership on or after January 1, 1937 decrease an applicant's credit. Section 2(a) does not, nor can it, encourage or discourage current or future membership in Petitioner union.

3.

The Board has not made a showing of actual motive to encourage Petitioner membership.

Assuming, *arguendo,* that one were to construe Section 2(a) to give a discriminatory advantage to Petitioner members, there is no record evidence of actual motive to encourage Petitioner membership. In *Radio Officers Union* v. *NLRB,* 347 U.S. 17 (1954), Justice Reed posited a "purpose" to encourage or discourage union membership as the "controlling" factor in discrimination cases. Acts of discrimination which would result in encouragement or discouragement of union membership remained the general subject of prohibition. Henceforth, however, each such action was required to be analyzed from the standpoint of motive. In situations where direct proof of motive was absent or controverted, the Board could no longer be content with a conclusion that the effect of the discrimination would be a perceptible increase or diminution of employee desire to join and remain a member of the union. It was required to find that such an effect was not only present but was evident and so powerful as to support an inference of intent to achieve it.

In *Local 357* v. *NLRB,* 365 U.S. 667 (1961), the Board attempted to treat the general subject of hiring halls and union control of employment opportunities, on the basis of its expert knowledge and long experience as to their impact upon the exercise of employee rights. The Board inferred an unlawful motive based upon its expertise in labor relations. The Supreme Court, in rejecting this approach, made it evident that the Board's power to infer

any element of an 8(b)(1)(A) or 8(b)(2) violation was sharply circumscribed. Justice Harlan's concurrence underlined the degree to which the Supreme Court curtailed the Board's authority to infer an unlawful motive. His opinion makes clear that the power of the Board to establish an illegal motive to encourage or discourage membership by inference, rather than direct evidence, is a closely limited power, operative only where the record shows no "significant" and "legitimate" justification for the action claimed to be illegally motivated. "Business justification" if both significant and legitimate outweighs the implied motive of encouragement or discouragement based upon alleged administrative expertise.

The test described by Justice Harlan in the *Local 357* case was subsequently adopted by the Supreme Court in *American Ship Building Co.* v. *NLRB,* 380 U.S. 300 (1965). This case dealt with a plant shutdown after an impasse had been reached in negotiations for a new collective bargaining agreement. The Supreme Court found no evidence that the employer was hostile to unions or that the lockout had been impelled by a desire to destroy or frustrate collective bargaining. Absent such motive, Section 8(a)(1)[7] was not violated. A lockout is not "one of those acts which are demonstrably so destructive of collective bargaining that the Board need not inquire into employer motivation . . . ."[8] As to alleged Section 8(a)(3)[9] violation, the Court again concluded that some proof of unlawful motivation was necessary. While in some cases "the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose," a bargaining

[7] 29 U.S.C. Section 158(a)(1).

[8] 380 U.S. at 309.

[9] 29 U.S.C. Section 158(a)(3).

lockout after impasse is not such a case. The Supreme Court's opinion in *NLRB* v. *Brown*, 380 U.S. 278 (1965), not only reiterated the severe limits on inferring motive as set forth in *American Ship*, but suggested, in addition, that a motive to discourage or encourage cannot be supplied absent record evidence, unless it is the only "reasonable inference."

In *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), an employer's refusal to pay strikers the vacation benefits accorded non-strikers was held by the Board to be a violation of Sections 8(a)(1) and (3). The Fifth Circuit refused enforcement of the Board order on the ground that there had been no affirmative showing of an unlawful motivation.

Chief Justice Warren writing for the majority stated that the Court's prior holdings in *American Ship* and *Brown* established two categories of non-motive discrimination cases. The first category comprises situations in which the discriminatory conduct is "inherently destructive of important employee rights." In such cases no proof of motive is necessary and a violation can be found even if affirmative evidence is introduced of business justification. The second category comprises situations in which "the adverse effect of discriminatory conduct on employee rights is comparatively slight." As to the second group of cases motive must be made out "if" (and the word is emphasized in the Court's opinion) the respondent comes forward with evidence of legitimate and substantial business justification for the conduct. See also *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

The Supreme Court's *Great Dane-Fleetwood* treatment of non-motive discrimination cases differs with its earlier *American Ship-Brown* holdings. Under *American Ship*

and *Brown,* the failure of General Counsel to introduce record evidence of motive, in cases of slight restraint to Section 7 rights, precluded the Board from finding unlawful discriminatory conduct. The *Great Dane-Fleetwood* decisions permit an inference of unlawful motive, in category two cases, unless the respondent comes forward with legitimate and substantial justification for its conduct. When the respondent introduces such evidence the General Counsel must respond with direct evidence of illegal motive to encourage or discourage membership. The failure of General Counsel to respond precludes the Board from finding unlawful discriminatory conduct. In *Great Dane* and *Fleetwood,* respondents failed to offer affirmative justification for their actions and the Board inferred unlawful motives.

Under either the *American Ship-Brown* or the *Great Dane-Fleetwood* tests the Board's conclusions on the record evidence in this matter must be set aside. Without affirmative proof of illegal motivation in reply to Petitioner's proof of "significant" and "legitimate" justification for Section 2(a), the Board should have dismissed the Complaint.

There is no substantial evidence of record to support the findings and conclusions of the Board that Section 2(a), in the absence of any direct evidence of discrimination and unlawful motive to encourage membership in Local 807, is violative of 8(b)(1)(A) and (2) of the Act. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951).

CONCLUSION

For all the above reasons it is respectfully submitted that the Petition to Review and Set Aside the Board Order should be granted and the Board's Cross-Application for Enforcement denied.

Respectfully submitted,

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STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Joseph Boselli , being duly sworn, deposes and says, that on the 20th day of May 19 74, at 12 o'clock noon M. he served the annexed Joint Brief of Petitioner and Intervenor in RE: Truck Drivers Local Union No. 807 et al. v. National Labor Relations Board.

upon Alan D. Longman, Esq.

Esq(s)., Attorney(s)

for Respondent

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that being the address designated in the last papers served herein by the said attorney.

Joseph Boselli

Sworn to before me this 20th

day of May 1974

Michael H. Sohn

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